COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion into Competitive Market Initiatives.	)	D.T.E. 01-54 Phase I

INITIAL COMMENTS OF WESTERN MASSACHUSETTS ELECTRIC COMPANY

I. INTRODUCTION

On May 31, 2001, the Department of Telecommunications and Energy ('Department") held a technical session to discuss actions the Department could take to expand the range of competitive supply options available to customers. The Department requested written comments on the topic. Western Massachusetts Electric Company ("WMECO") and other parties commented on June 14, 2001. On June 29, 2001, the Department simultaneously directed distribution companies to take several steps relating to dissemination of data and opened D.T.E. 01-54, *Investigation into Competitive Market Initiatives.*

In its June 29 Order, the Department determined that the name, address and rate class of Default Service customers are not proprietary and directed each distribution company to provide this information to a licensed competitive supplier upon execution of an agreement requiring the supplier not to use this information for any purpose other than to market electricity-related services

(Order, p. 6).[1] WMECO expeditiously implemented this directive and all licensed competitive suppliers seeking Default Service customers' names, addresses and rate classes now have these data.

The June 29 Order also directed each distribution company to establish a list of "Active Competitive Suppliers" in its service territory and to promote the suppliers on the list using its normal channels of communications with its Default Service customers. WMECO has assembled the list required by the Department and is promoting the names of suppliers on the list.

The Department identified several issues to be explored in D.T.E. 01-54 and organized them into phases for further discussion. With respect to Phase I, the Department sought comments on a proposal that "each distribution company be required, upon request of a competitive supplier, to provide historic load information and credit information for those default service customers that have affirmatively authorized the distribution company to do so" (Order, p. 8).

On July 24, 2001, the Department held a technical session to discuss the Phase I initiative. In the course of the technical session a number of issues were raised in addition to the Department's proposal in the June 29 Order. Finally, on July 27, the Department issued a briefing question to participants pertaining to the validity of electronic signatures in Massachusetts.

WMECO appreciates the opportunity to submit comments in D.T.E. 01-54, Phase I. As WMECO stated in its June 14 comments, it is appropriate for the Department to explore avenues, consistent with Massachusetts law and

[1] In the June 29 Order, the Department uses the terms "competitive supplier" and "supplier" to refer to both licensed competitive suppliers and electricity brokers. WMECO uses the same protocol in these comments.

Department regulation and precedent, to expand customers' opportunities to access the competitive energy market. To the extent possible, all customers should have competitive choices for their energy supply. This does not imply, however, that all data in the possession of a distribution company should simply be turned over to competitive suppliers. Changes to the rules presently in place should be carefully reviewed to ensure that the intended beneficiaries of the restructured system, customers, will indeed benefit. Much has been asked of customers in the last few years, not only relating to rules regarding customer choice and industry restructuring, but also in connections with the price increases associated with dramatically increased energy fuel costs. The Department should continue to hold customer interests paramount.

In addition to customer interests, there are other interests that the Department should weigh heavily in considering any further changes. First, to the extent possible, distribution companies should not be placed in the role of an intermediary between the customer and a competitive supplier. The system will work best when competitive suppliers make supply arrangements directly with customers. Second, no changes should be implemented that create substantial additional costs on distribution companies. WMECO is ready to facilitate competitive electricity supply, but that should not equate to being forced to absorb large additional costs for which WMECO is not compensated.

II. RELEASE OF CUSTOMER NAMES, ADDRESSES AND RATE CLASSES

A. Introduction

At the July 24 technical session, several points arose with respect to the names, addresses and rate class information the Department ordered released in its June 29 Order. As indicated above, WMECO and the other distribution companies have quickly and successfully instituted the plan set forth for these data by the Department and the system appears to be working. WMECO will participate in efforts to establish a common data format to make it even more efficient and easy to be used by competitive suppliers.[2]

B. Names, Addresses and Rate Class Information Should Not Be Subject to an Opt-Out or Opt-In Requirement.

The Department has determined that names, addresses and rate class information is not proprietary and these data have been provided to competitive suppliers. Given that the data is not proprietary and, therefore, are not the type of information that customers have an interest or right in keeping confidential, it does not follow that there can be an Opt-Out or Opt-In requirement. That is, an Opt-Out or Opt-In requirement necessarily implies that the information in question is proprietary and that it should be divulged only after extensive notice to customers. If the information is not proprietary, the information is not of such a nature to require customer release (either passively under an Opt-Out plan or actively under an Opt-In plan). An analogy in the communications area is the customer listing published in telephone directories. Customers' telephone numbers and addresses are routinely made public in telephone directories.

As a practical matter, also, an Opt-Out or Opt-In system should be implemented before any data is released by other means. Because the name,

[2] In addition, as directed by the Department, WMECO has added qualified brokers to the Active Competitive Supplier list. The new list including brokers was sent electronically to the

address and rate class data have already been released without any customer Opt-Out or Opt-In requirement, it is too late to implement a consistent Opt-Out or Opt-In system for existing Default Service customers. While an Opt-Out/Opt-In system conceivably could be devised for new Default Service customers, this would mean that new Default Service customers would be treated differently from existing customers. There is no basis for such differing treatment and this would only lead to customer confusion.

WMECO is aware, however, that some customers may not wish to have their names or addresses divulged and wants to respect the wishes of any such customer. Accordingly, WMECO proposes to delete from the data provided to competitive suppliers and brokers the names, addresses and rate information from customers that ask to be removed from the lists. In order to inform customers that they have the option to have their names removed from any list provided to competitive suppliers, a message or short bill insert could be employed. Although in some respects the ability of customers to remove their names from the competitive supplier list mirrors an Opt-Out mechanism, WMECO believes, as explained above, that no formal Opt-Out or Opt-In is appropriate for non-confidential information. Removing a customer's name and address, especially at this point where names and addresses have already been divulged, is an informal courtesy to customers.

C. Similar Treatment of Standard Offer Service Customer Data Is Reasonable.

At the July 24 technical session, the Department staff questioned whether Standard Offer service customer names, addresses and rate class information

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Department on August 6, 2001.

should be divulged in the same manner as Default Service customer data. This is particularly relevant for WMECO because, although WMECO's Standard Offer service rates are somewhat lower than its Default Service rates, both services are fully competitively procured. Consequently, competitive suppliers may be able to market successfully to Standard Offer service customers as well as Default Service customers. In order to assist in these efforts, WMECO has no objection to providing the names, addresses and rate class information of WMECO's Standard Offer service customers to complying competitive suppliers and brokers. It is important that the rules for data release for Standard Offer service customers be exactly the same as that already ordered for Default Service customers. This will eliminate confusion, especially when a Standard Offer service customer moves to Default Service.

WMECO currently provides the Default Service customer data on an Excel spreadsheet to qualifying suppliers due to the relatively low number of customers for which data is sought (no supplier has requested residential customer data in WMECO's service territory as of yet). However, there is significantly more data to be provided for Standard Offer customers, which suggests that it may be more efficient to provide the data over WMECO's Internet Web site. WMECO is in the process of determining the best method for disseminating both Standard Offer and Default Service data and how long it will take to make the needed adjustments.

D. "Electricity-Related Services" Should Be Defined.

In its June 29 Order, the Department stated that in order for a competitive supplier to obtain the Default Service data it must execute an agreement with the

distribution company requiring the competitive supplier not to use this information for any purpose other then to market *electricity-related services.* At the July 24 technical session, participants requested clarification from the Department as to the breadth of the term electricity-related services. In particular, one participant asked whether energy management services were electricity-related services. Tr., p. 74.

Because the Department has determined that the name and address data is not proprietary, WMECO believes that the Department has considerable latitude in determining how these data could be used. WMECO does not have an objection to the use of the information to market energy management services. WMECO's primary concern is that the Department detail with some specificity the definition of electricity-related services so competitive suppliers will know how the data is to be used and WMECO will be able to respond to its customers' questions in this regard.

III. DISSEMINATION OF PROPRIETARY CUSTOMER DATA

A. The Department's Proposal With Respect To Historic Load Information Is Reasonable And Should Be Adopted But Credit Data Should Not Be Included.

1. Load/Usage Information Is Proprietary.

In its June 29 Order, the Department indicated that customer historic load information and credit information would be considered proprietary (Order, p. 8). This approach is consistent with the Department's prior determinations and the Electric Utility Restructuring Act (Chapter 164 of the Acts of 1997) ("Act"). In D.P.U./D.T.E. 97-65 (1998), p. 31, the Department stated that it shared "the concern by the Utility Companies, among others, regarding the confidential

nature of [historic usage] information" and determined that these data would continue to be afforded proprietary treatment.

The recognition that certain customer information is proprietary is also made plain by the Act. Two sections of the Act, codified at G.L. c. 164, § 1F(7) and c. 164, § 1C(v), state that customer records are confidential and restrict the dissemination of this material. The Department's regulations reflect this statutory directive by, for example, stating that the requirement that distribution companies are to share with all competitive suppliers the information provided to its competitive affiliate does not apply to "customer-specific information obtained with proper authorization." 220 CMR 12.03(10).

Given the statutory and regulatory mandates relating to customer-specific data and, as importantly, the continued sensitivity of usage data and the customers' expectations that it will be treated confidentially, the Department should treat the question of confidentiality as settled. The real question facing the Department is under what conditions proprietary customer information will be provided to competitive suppliers.

2. Usage Data Should Be Released On Affirmative Authorization But Credit Information Should Not Be Disseminated.

The Department has proposed, as indicated in Section I, above, that "each distribution company be required, upon request of a competitive supplier, to provide historic load information and credit information for those default service customers that have affirmatively authorized the distribution company to do so" (June 29 Order, p. 8).

A system has been put in place that provides historic load information to suppliers through an electronic transaction, as described in the Electronic Business Transaction Working Group Report, on file with the Department. The electronic transaction is a seamless procedure that was developed specifically at the request of competitive suppliers and provides the usage data to them within one business day of the request. Accordingly, there are tremendous advantages associated with using this system. It is in place and working well so there is no need to incur the significant time and expense of developing a new system (*see* Tr., pp. 83-85). In addition, it provides the usage information to competitive suppliers quickly.

The Department has also proposed that credit information be disclosed by the distribution company if affirmatively authorized to do so. Importantly, the competitive suppliers at the July 24 technical session, with one limited exception, did not believe that it was necessary for distribution companies to provide credit information. One supplier suggested a list of all customers not more than 30 days in arrears should be provided, but this would cause logistical problems since a large percentage of customers are 30 days in arrears at one time or another; other suppliers indicated neither this list or other credit information was necessary. New Energy indicated that credit information can be obtained directly from the customer (Tr., p. 134). Dominion Retail stated that its organization would be fine without credit information and it could be obtained elsewhere (Tr., p. 140). In addition, the Division of Energy Resources indicated that while it is favorably disposed to information disclosure generally it is not in favor of disclosure of credit information (Tr., p. 135).

WMECO agrees with the majority of the suppliers that dissemination of credit data should not be provided by the distribution companies. Credit information has not been previously disclosed by distribution companies and is not a function about which WMECO is knowledgeable. Further, release of credit information is a highly charged area for most customers and could potentially cause significant negative reactions from customers and embroil distribution companies in costly disputes. Finally, as indicated above, there are other entities that specialize in credit reports and competitive suppliers can go to those entities to obtain the credit information they need (*see* Tr., p. 138).[3]

B. An Opt-Out Procedure For The Release Of Confidential Information Should Be Rejected.

At the July 24 technical session, several competitive suppliers proposed that proprietary information be disclosed on an Opt-Out system. Under such a system proprietary information would be provided to competitive suppliers unless a customer affirmatively notifies the distribution company that that the information not be disclosed. It is understandable that competitive suppliers would take this position because it results in their obtaining the maximum amount of information with the minimum of effort. However, for the following reasons it is a flawed policy and should not be adopted.

1. Opt-Out Is Contrary To Customer Interests.

The primary reason that Opt-Out should be rejected is that it will result in customers' proprietary data being provided to competitive suppliers without their knowing consent. The customer education associated with Opt-Out is very

[3] Nothing in WMECO's further comments should be interpreted as indicating that credit

expensive and time-consuming because it is necessary to attempt to inform every customer that their proprietary information is being released. But even with such an expensive, time-consuming process, every indication is that there will be a high percentage of customers that will not have read the relevant information or understand the relevant information (*see* Tr., pp. 44-45).

As a result, there will be significant numbers of customers that will not be aware that their confidential information is being given out to numerous third parties and will be upset at that fact. It is not simply the distribution companies that believe an Opt-Out would cause customer outrage. A supplier at the technical session, Competitive Energy Services, confirmed the likely reaction from customers to Opt-Out by stating:

> You know, while I'd love to have an opt-out-based list, I know that we have a number of customers that would object vehemently to having their usage information or credit information being made public. Some of them would object to an opt-out-based program on the theory that somehow they weren't advised of it and they got into this opt-out based program without knowing about it and would be very displeased. Tr., p. 98.

Given all the changes that customers have been exposed to in the last few years, the Department should not cause further customer confusion by endorsing an Opt-Out plan.

2. Opt-Out Is Contrary To The Department's Regulations And The Electric Utility Restructuring Act.

The Department's regulations currently prohibit an Opt-Out plan for customer historic usage data. 220 CMR 11.05(4)(a) states that "[e]ach Competitive Supplier or Electricity Broker must obtain verification that a Customer has

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information should be released to competitive suppliers, regardless of the method adopted for disseminating proprietary information.

affirmatively chosen to allow the release of the Customer's historic usage information to the Competitive Supplier or Electricity Broker, in accordance with 220 CMR 11.05(4)(c). 220 CMR 11.05(4)(c) provides that affirmative choice may be accomplished by a "customer-signed Letter of Authorization, Third-party verification, or the completion of a toll-free call made by the Customer to an independent third party…." The regulations, therefore, require an affirmative choice while an Opt-Out plan relies on a customer taking no affirmative action. Accordingly, putting aside other problems with Opt-Out, the regulations prohibit Opt-Out and the Department would be required to initiate a rulemaking proceeding under 220 CMR 2.00 *et seq.* should it further consider an Opt-Out plan.

In addition to the explicit prohibition of Opt-Out in the Department's regulations, the Act, upon which the regulations are based, prohibits Opt-Out procedures. The Act states that any customer must "affirmatively choose" any entity to supply electricity (codified at G.L. c. 164, § 1F(8)). The Act also states that it is "unlawful" for a competitive supplier to provide power or other services without first obtaining affirmative choice and specifies what affirmative choice means (the same definition as appears in 220 CMR 11.05(4)(c)). *Id.* While customer historic load data is not explicitly mentioned, the meaning of the Legislature's language is to require affirmative choice from a customer as a prerequisite for further steps. An Opt-Out plan would violate the intent of the Act.

3. The Cost of Opt-Out To A Distribution Company Is High And Unfairly Places The Distribution Company In the

Middle Of A Customer-Competitive Supplier Relationship.

The cost of an Opt-Out plan is two-fold. There is the cost of customer education, mentioned above. When Opt-Out was attempted by The Connecticut Light & Power Company in Connecticut, it was a six-month effort which, even so, resulted in many confused telephones calls to the distribution company. *See* Tr., p. 45. In addition to the confusion and cost of external factors, there is the cost of developing a distribution company internal compilation and tracking system. For WMECO, it is possible that tens of thousands of customers may decide to Opt-Out. For a larger distribution company it is easily possible that the number could be over 100,000. Tr., p. 44. A system has to be put in place to track each customer deciding to Opt-Out and whether the customer subsequently changes its decision. In addition, there is an additional cost because all new customers to the service territory also have to be provided with customer education material to provide a basis for Opt-Out. A new system would then have to be developed to allow for the proper access of the information by competitive suppliers.

Creating an Opt-Out system means that there would be two sets of customer lists. There already is the list of customer names and addresses that has been provided to competitive suppliers. Customers can take their names off this list. Then there will be the Opt-Out list of those customers choosing not to provide usage data to competitive suppliers. Customers must rely on the distribution company to monitor the list and ensure that competitive suppliers get only the right information about the right customers. It is likely that there

will be some confusion and, possibly, some erroneous withholding or release of data in such a system.

Such a system is also inferior because it places the distribution company in the middle of a decision by customers in connection with their competitive energy supply. At present, if a customer wishes to provide proprietary data to a supplier it is a matter between the supplier and the customer. The only distribution company involvement is when the competitive supplier notifies the distribution company that the customer has given its affirmative consent to release data and the data is released. WMECO believes that one primary intent of the Act was to make the provision of electricity a competitive function and one that should be resolved between a customer and its competitive supplier. An Opt-Out plan (as is also the case with an Opt-In plan), makes the distribution company the central player in who receives what type of data from which customers. This is a further rationale contrary to adopting an Opt-Out plan.

4. The Fact That Other States May Employ Some Type of Opt-Out Does Not Guide Massachusetts.

At the July 24 technical session, it was stated that other states, including Ohio, have a full or partial Opt-Out system. Whatever the case may be, picking and choosing discrete elements that may function adequately in other jurisdictions is a prescription for failure for Massachusetts. Ohio undoubtedly has a somewhat different restructuring statutory plan and different rules from Massachusetts in a number of areas. At some point, after considerable study, it is possible that Massachusetts may conclude that the overall Ohio restructuring system is preferable to that in the Commonwealth and move to adopt Ohio's

plan. Without a comprehensive analysis of all the elements of Ohio's plan, the Department should not be swayed by the fact that Ohio or other states may allow a procedure that is not allowed in Massachusetts. In any case, the available experience in New England is that Opt-Out has proven costly and confusing without any demonstrable benefit. Tr., pp. 44-45, 98.

C. More Expansive Variants Of An Opt-In Plan Should Not Be Implemented.

A limited Opt-In plan, as the Department appears to propose in its Order, focuses on individual customer choice. A more expansive Opt-In plan has many of the same problems as an Opt-Out plan and should not be adopted. An Opt-In plan removes one major disadvantage of an Opt-Out plan: Because it requires the affirmative choice of a customer, it is allowed under the Department's regulations and the Act. However, an expansive Opt-In plan retains the other disadvantages of Opt-Out.

First, an expansive Opt-In requires the same type of extensive customer education effort as Opt-Out. This effort is expensive and time consuming but, even so, will lead to considerable customer confusion. The customer education effort will have to continue indefinitely because of the flow of new customers.

Second, an expansive Opt-In may result in roughly the same volume of customers on the distribution company's Opt-In list as would result on an Opt-Out list. The distribution company has to put in place a system to compile the Opt-In list and manage it as additions and deletions occur. It is likely that there will be some errors with respect to data over time. Also, a system has to be put in

place to make available the Opt-In customers proprietary data to competitive suppliers. Thus, the administrative costs and burdens are the same as Opt-Out.

Third, as in Opt-Out, an expansive Opt-In plan makes the distribution company the critical entity in providing data and the intermediary between the competitive supplier and the customer. Placing distribution companies in this role is highly undesirable.

D. Clarification Is Needed Before It Is Possible To Determine If Additional Types Of Information Should Be Released To Competitive Suppliers.

At the technical session, there was discussion concerning releasing additional types of information to competitive suppliers, such as interval data, budget billing indicator, account number, meter number, and phone number. WMECO believes that the current names, addresses and rate class information on the 'public' list along with the usage information that can be obtained by competitive suppliers with the affirmative choice of a customer is sufficient for competitive suppliers to market services to customers.

WMECO, however, is not adverse to providing additional information if it is handled properly and will have a positive impact on the competitive market. In addition, it may be possible to provide some data on a more efficient basis, such as interval data. As soon as the Department issues an Order in this phase of the proceeding clarifying the treatment of data, further discussion with competitive suppliers within the Electronic Business Transactions Working Group should be productive in determining what additional information may be provided.

E. The Type Of Signature Needed To Effectuate Supplier Switching And Release Of Proprietary Information Should Be Further Investigated.

The Department has requested that parties address "whether there is any "legal impediment to the use of electronic signatures in transactions related to contemplated competitive market initiatives such as the authorization for switching a consumer to a competitive supplier or the authorization to release customer usage information." July 27 Procedural Memorandum, p. 1.

General Laws, c. 164, §1F(8), provides that a customer must sign a letter of authorization or have its telephone authorization verified by a third party in order to switch electricity suppliers. WMECO is unfamiliar with any state law that would interpret the signature requirement in G.L. c. 164, §1F(8), as allowing an electronic signature. Thus, absent such a statute or a federal statute pre-empting state law, it appears that Section 1F(8), and the Department's regulations at 220 CMR 11.05(4)(b) and (c) (which mirror the statutory language), would have to be changed in order to allow an electronic signature to substitute for a "wet" signature.

With respect to the authorization to release customer usage information and other proprietary information, in general there is no statutory requirement that a written authorization is required from the customer. There is such a prohibition in the Department's own regulations. See 220 CMR 11.05(4)(a). Therefore, should it wish to allow an electronic signature, the Department could initiate a rulemaking under 220 CMR 200 *et seq.* proposing to allow explicitly an electronic signature.

While the General Laws do not in general require a signature for the release of proprietary customer information, G.L. c. 164, § 1C(v) prohibits distribution companies from sharing any proprietary information with its affiliate

without written authorization of the customer. Because this is a statutory provision, it could not be changed by the Department. Accordingly, while the Department may institute a rulemaking to eliminate the need for a wet signature from customers, it may be difficult to do so with respect to distribution company affiliates. This could place affiliates in an unfair disadvantage and adversely affect the competitive market in the distribution company's service territory.

The last factor that could affect the ability of customers to substitute electronic signatures for wet signatures is the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), 15 U.S.C. § 7001 *et seq.* The E-Sign Act clearly provides that electronic signatures may be used in many situations and are as valid in those situations as handwritten ones. It may be that the E-Sign Act pre-empts the state statutory language pertaining to written authorization and allows electronic signatures for the switching of customers or the release of proprietary information. However, pre-emption turns on a number of complex legal issues and WMECO expresses no opinion on these points at this time. It may be that the Office of the Attorney General would be the appropriate party to provide the analysis and issue an opinion as to the effect of the E-Sign Act.

IV. CONCLUSION

WMECO requests that the Department consider the above comments in its deliberations regarding competitive market initiatives.

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